

Pohle, David

From: Pohle, David
Sent: Tuesday, February 16, 2016 10:04 AM
To: Smith, Aaron C LRB; margaret.a.crawford@usace.army.mil; bridget.brown@usace.army.mil
Cc: Montella, Daniel; Modigliani, Justine
Subject: (Note from V.M. Fichera re Martville mine) FW: EPA has failed to respond to formal complaints filed July 23, 2015...

Hi guys,

Please see below. Sometime this week, Dan, Justine and I will have to explain to our division director, Joan Matthews, everything that is going on re the mine and the complaints of V.M. Fichera. Could we please do a call with you to hear what develops may have occurred at the Corps during the last six months related to this matter.

Dave

From: Matthews, Joan
Sent: Tuesday, February 16, 2016 9:41 AM
To: Pohle, David <Pohle.David@epa.gov>; Montella, Daniel <Montella.Daniel@epa.gov>; Balla, Richard <Balla.Richard@epa.gov>
Cc: Mason-scott, Stacey <Mason-Scott.Stacey@epa.gov>
Subject: FW: EPA has failed to respond to formal complaints filed July 23, 2015...

Pls schedule a meeting with me to discuss. Invite Justine.

Thanks.

Joan

From: Enck, Judith
Sent: Monday, February 15, 2016 8:09 PM
To: LaPosta, Dore <LaPosta.Dore@epa.gov>; Matthews, Joan <Matthews.Joan@epa.gov>
Subject: Fwd: EPA has failed to respond to formal complaints filed July 23, 2015...

Plz discuss and respond to this gentleman. Thanks

Sent from my iPhone

Begin forwarded message:

From: "V. M. Fichera" <vmfichera@gmail.com>
Date: February 15, 2016 at 6:21:38 PM AST
To: modigliani.justine@epa.gov, Pohle.David@epa.gov,
McKenna.Douglas@epa.gov, mann.katherine@epa.gov, enck.judith@epa.gov
Cc: Richard Lippes <rlippes@concentric.net>, attydenton@aol.com
Subject: EPA has failed to respond to formal complaints filed July 23, 2015...

...and has also ignored the follow-up phone call and correspondence in this matter dated August 21, 2015.

The original complaint email of July 23, 2015 and the EPA's July 28, 2015 acknowledgment of receipt are forwarded below this email thread. Additional information was forwarded to the

EPA on October 8, 2015 which, together with the August 21, 2015 correspondence, is without acknowledgement of receipt or reply to date.

As an additional commentary to my August 21, 2015 email (also reproduced herein below my electronic signature), please note that the small gravel mine already existing on the 13181 Sanford Road property in Martville / Sterling predates the New York State 1975 Mined Land Reclamation Law by as much as nine years.

This simple fact alone appears to undermine the exculpatory representations made to me by the DEC concerning the "illegality" of constructing berms before the permit applicant clear cut land that was not to be disturbed before the requisite archaeological study-- land also represented in the moving papers even now as "wooded," steep-sloped land right above the national wetland and the adjoining Sterling Creek and principal aquifer -- adjacent to a national wetland which the Army Corps of Engineers failed to even inspect during its June 12, 2015 visit to the Life-of-Mine site.

The DEC apparently would have me believe that state law forbids the use of storm water protection measures on a steep slope above a national wetland. And the Army Corps of Engineers appears to have intentionally failed to inspect the wetland while onsite earlier, or to report my complaint to the EPA.

The 1966 date of the small mine is documented in Town of Sterling government minutes on the word of a Town Councilman (the agent and son of the former owner and broker of the sale of the land to the permit applicant), located midway down the second page of the minutes at <http://www.cayugacounty.us/portals/1/sterling/government/minutes/zbabrd04.27.2015.pdf>. This is only one set of minutes with this information; this fact has been repeated at numerous Town government meetings.

I look forward to at last learning the results of your August 21, 2015 visit to the site and the EPA's formal response -- almost six full months after I first filed my complaints in this matter.

Yours truly,

Dr. V. M. Fichera (PhD)

On Fri, Aug 21, 2015 at 5:54 PM, V. Fichera <vmfichera@gmail.com> wrote:

Dear Justine Modigilani and David Pohle:

First of all, the DEC Region 7 Permit Administrator has referred me to the EPA for all questions with respect to your inspection of the 13181 Sanford Road, Martville, New York site for the wetland and Sterling Creek fill, siltation and/or sedimentation complaints which I filed with both agencies. Therefore I am sending along this email to you directly.

As I mentioned to Justine Modigliani who was kind enough to take my call during her vacation today, I met today, August 21, 2015, with DEC Region 7 Director Ken Lynch, Permit Administrator David Bimber, and DEC Counsel Barbara McGuin.

During our meeting, the fact of your joint inspection of the site this morning was brought up and when I complained that the permit applicant had taken no steps to control runoff by, for

example, establishing berms, the Permit Administrator told me that the applicant would have been violating the state's mining law if he had done that before being issued a mining permit.

I wish to inform you that I can find no justification for that statement in the law. Indeed, as is explained at the DEC Website at this URL (<http://www.dec.ny.gov/lands/24993.html>), only if the berms needed more than 1000 tons of excavated material or 750 cubic yards from the site would he have needed a permit. Because his proposed mine would excavate much more than that, it will indeed need a permit for the larger planned excavation. The land owner could have taken the necessary amount from the existing gravel pit on that property and would almost certainly have been violating no law in doing so, provided, of course, that he was within the 1000 tons/750 cubic yards limits of the state's mining laws.

What should be addressed by the DEC, and which has still not been addressed, is the fact that the permit applicant was clear-cutting the land which he explicitly stated in his Mined Land Use Plan would not be cut until just before each segment of the large mining project was progressing, in order to maintain a sound barrier, etc., etc., etc. Instead, he had clear-cut ten or more acres during the period of his application and before the SEQR Negative Declaration was issued, a fact which was documented in the Phase B archaeology report by Nikki Waters.

I will look forward to hearing back from you on the status of my complaint and hope to have access to pictures as well as a formal report on the health of the wetland and the Sterling Creek. I just want to ensure that if you are planning on overlooking fill/siltation/sedimentation in the wetland or the tributary of Lake Ontario on the basis of an ad hoc verbal explanation that the state's mining laws prohibit the land owner from taking the usual and, indeed, promised storm water pollution control measures, I will require a complete legal citation to justify the EPA's abandonment of the Federal laws and jurisdiction in this matter.

Thank you for your anticipated assistance in this matter of the protection of the Lake Ontario tributary the Sterling Creek and its wetlands in Sterling, New York.

Yours truly,

Dr. V. M. Fichera (PhD)

----- Forwarded message -----

From: <R2_New_Web_Inquiry@epamail.epa.gov>

Date: Tue, Jul 28, 2015 at 4:18 PM

Subject: Re: Formal complaints re: 13181 Sanford Road, Martville, NY: filled national wetland and protected Sterling Creek waters; endangered species; USACE and EPA lack of due diligence

To: "V. Fichera" <vmfichera@gmail.com>

Cc: "Niver, Robyn" <Robyn_Niver@fws.gov>, "Crawford, Margaret A LRB"

<Margaret.A.Crawford@usace.army.mil>, Bridget LRB Brown

<bridget.brown@usace.army.mil>, "Robinson, Judy A LRB"

<Judy.A.Robinson@usace.army.mil>, aaron.c.smith@usace.army.mil,

karl.d.jansen@usace.army.mil, michael.a.busby@usace.army.mil, R2_Web_Inquiry@epa.gov

Dear Dr. Fichera:

The United States Environmental Protection Agency ("EPA"), Region 2, Wetlands Enforcement Section is in receipt of your formal complaint regarding proposed mining activity at 13181 Sanford Road, Martville, NY. The activity currently involves logging upslope of Sterling Creek, a tributary to Lake Ontario. We have checked our mapping resources, and they indicate forested wetland to the south of the mining site may be under federal jurisdiction.

In the absence of silvicultural "best management practices" for siltation control, siltation and sedimentation resulting from the logging activity on the mine site could constitute illegal fill in the wetland. The discharge of the earthen fill material into wetlands, when the wetlands are "waters of the United States" constitutes a "discharge of pollutants" as defined by Section 502(12) of the Clean Water Act, 33 U.S.C. § 1362(12). Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into waters of the United States except as in compliance with Sections 301, 306, 307, 318, 402 and 404 of the Clean Water Act. Section 404 of the Clean Water Act, 33 U.S.C. § 1344, authorizes the Secretary of the Army to authorize discharges of dredged and fill into navigable waters of the United States. The discharge of pollutants, consisting of dredged and fill material, into navigable waters of the United States without authorization from the Secretary of the Army as provided by Section 404 of the Act is unlawful under Section 301(a) of the Act, 33 U.S.C. § 1311(a).

Wetlands perform several ecological functions including flood attenuation, runoff storage, pollutant trapping and water quality improvement. Pollutant trapping aspects of wetlands are well documented and include the removal of suspended solids, dissolved solids, toxics, organic carbon/biological oxygen demand, nitrogen, phosphorus, and trace metals before water moves downstream and ultimately discharges into a larger waterway. The wetlands at this site likely improve water quality and could also serve to store flood waters as well as provide nutrient cycling and plant and animal communities/habitat.

Potential siltation and sedimentation impacts of this proposed mining activity are currently being reviewed by the New York State Department of Environmental Conservation. The United States Army Corps of Engineers is currently reviewing the potential for fill impacts, if any, of the proposed mine to the wetlands. With regard to your immediate concerns of siltation and sedimentation in the wetlands from stormwater runoff, we are referring your inquiry to the Region 2 stormwater compliance program for consideration.

For further information, you may contact Justine Modigliani, Chief of the Compliance Section, Water Compliance Branch of the EPA Region 2 office at the following address, email, and telephone number:

DECA-WCB-CS
290 Broadway
Floor 20
New York, NY 10007

Office #: [212-637-4268](tel:212-637-4268)
Email: modigliani.justine@epa.gov



Or you may obtain further information from the following website:

<http://www.epa.gov/owow/wetlands/>

If you have any questions, please contact David Pohle, Wetlands Enforcement Coordinator, by telephone at [\(212\) 637-3824](tel:(212)637-3824) or e-mail at Pohle.David@epa.gov.

Sincerely,

David Pohle

Web Inquiry
Sent

From	"V. Fichera" < vmfichera@gmail.com >
Delivered Date	07/23/2015 03:53 PM
Subject	Formal complaints re: 13181 Sanford Road, Martville, NY: filled national wetland and protected Sterling Creek waters; endangered species; USACE and EPA lack of due diligence

Nota Bene:

The email below contains information concerning the status of the land at 13181 Sanford Road in Martville from September 2014 through June 2015, providing suspicion of runoff silt and sedimentation in the adjoining wetland and creek.

The documentation herein provides evidence of logging pre-October 2014, which could have endangered the habitat of the Indiana myotis bat and potentially other endangered species in the wetland and the stream. The USDA photographs at its Soil Map Website from September 14, 2014 (cf. <http://websoilsurvey.nrcs.usda.gov/app/> for the above address) show the intermediate stage of logging and the attached amateur drone photo shows the final grubbed status of approximately ten acres of the land above the national wetland and the Sterling Creek as of June 29, 2015 -- after the heavy snows and flash flood rains of the spring which almost certainly would have resulted in fill in the wetland and stream waters.

My personal conversation with the Alliance Archaeological Services owner (cf. email below) provides additional evidence of the timeline and of the lack of any storm water pollution control measures at the site subsequent to the logging and grubbing of the land by the permit applicant. The archaeologist also revealed that the permit applicant cleared the area with intentional disregard for the possible endangerment of the requisite archaeological studies because she verbally warned him about the area; his disregard of the logging, archaeological, and storm water protection protocols likely thereby threatened habitats of the endangered bat and other species, as well. The DEC was receiving multiple written assurances from the permit applicant throughout the period of June 2014 to May 2015 that the entire area was wooded, with the exception of the earlier mine location, and that the applicant would respect storm water pollution control practices; the controls apparently did not take place, as attested to both by the photographic evidence and the testimony of the archaeologist.

Please also consult the NFWS wetland finder maps as well as the DEC Christopher Construction map (cf. attached) which both clearly indicate the presence of a Federal palustrine

wetland and protected Sterling Creek bordering the steep slopes upon which the permit applicant intends to mine gravel sixty feet deep above the wetland. If the Army Corps of Engineers has written documentation of a subsequent formal delineation of the wetland to justify the permit applicant's quoting the Army Corps as saying "There is no wetland there," please provide the name and date of the relevant documents so that I may add a request for their inspection to my July 5, 2015 formal FOIA request of the Army Corps which has not yet been acknowledged by the Buffalo District.

I would like to suggest that the NFWS and the Army Corps and the EPA consult the information contained on the NFWS wetland finder map as well as the attached DEC-generated map so that your multi-agency review and recommendations may be coordinated and include the Federal wetland and protected stream. I remind all parties that the information from these government maps and photographs, supplemented by amateur drone photography, supports my earlier and instant formal complaints to the Army Corps and to the NFWS that there may have been violations of the Federal laws and regulations which your agencies are sworn to protect by investigation and enforcement. To these I add the instant complaints to all three agencies, to include as well the EPA.

To date, the Army Corps of Engineers has failed to reply to correspondence, formal complaints, and evidence presented in these matters since the latter part of June 2015. The Army Corps of Engineers representative who visited the LOM on June 12, 2015 has, by her own admission, only walked the Life-of-Mine area, never visiting the wetland below. Therefore, the allegations proffered by the permit applicant that "There is no wetland there" are, to date, unsubstantiated by the Corps with any documentation in any of its minimal correspondence to the undersigned to date.

I therefore expect to receive responses to my FOIA request of the Corps, and to my formal complaints in these matters before both Federal agencies, with all agencies performing due diligence in these important environmental matters where the DEC, as well, has failed to perform due diligence in the NYS SEQR process, as documented in detail in correspondence sent to both the NFWS and the Army Corps of Engineers.

- Dr. V. M. Fichera (PhD)

Adjunct Professor
Binghamton University-SUNY

----- Forwarded message -----

From: **V. Fichera** <vmfichera@gmail.com>

Date: Thu, Jul 23, 2015 at 12:23 AM

Subject: Re: Martville Mine, Town of Sterling, Cayuga County (14PR3874 and 15PR02499)

To: "Clancy, John M (DEC)" <john.clancy@dec.ny.gov>

Cc: "Perazio, Philip (PARKS)" <Philip.Perazio@parks.ny.gov>, "Vandrei, Charles (DEC)" <charles.vandrei@dec.ny.gov>, "cjf9679@yahoo.com" <cjf9679@yahoo.com>, "Bimber, David L (DEC)" <david.bimber@dec.ny.gov>, "Nikki Waters, Alliance Archaeology" <nwaters@alliancearchaeology.com>, "Lynch, Kenneth (DEC)" <kenneth.lynch@dec.ny.gov>, "Mcginn, Barbara A (DEC)" <barbara.mcginn@dec.ny.gov>, Clint Halftown <clint.halftown@gmail.com>, timtwoguns@verizon.net, RachelPolansky@localsyr.com, neil@wayuga.com, Randy Lawrence <tsterlin@twcny.rr.com>, lsomers2@twcny.rr.com, Lisa Cooper <lcooper2@nycourts.gov>

Dear John Clancy:

It was my impression in speaking to both Mr. Perazio of the Parks Service and Mr. Vandrei, a DEC archaeologist, that the OPRHP's recommendation is that the entire Life of Mine area be subject to the archaeological studies before the formal granting of a mining permit to ensure the process of preservation of possible Native American heritage artifacts and remains within the area of the LOM.

I should add that Ms. Nikki Waters of Alliance Archaeological Services, who performed the first two of the studies of the four required "phase" areas of the proposed Martville mine, informed me in a phone conversation on July 2, 2015 that, while she was engaged in the first onsite study last fall, she warned the mine operator not to log or grub the next planned area for investigation before she had the opportunity to conduct the second area study. She recounted to me her surprise to discover that her warning was not heeded: when she went to the site for the second study around April 2015, she discovered that the land had already been cleared, that no runoff protection berms had been established, etc. She did feel that, luckily, she was able to find enough undisturbed land to do the requisite diggings. Indeed, aerial photos of the site, both from the USDA on September 14, 2014 and from a private amateur drone operator on June 29, 2015, confirm her statements.

It would appear that to avoid a repetition of this (and any/all such applicant) operator's "misunderstanding" of the expected protocols, the DEC should follow the recommendations of its own archaeologist, as well as the Parks Service, that all permit applicants complete the requisite archaeological studies for the entire proposed Life of Mine area before a mining permit is granted, for the protection of Native American heritage, the land itself, and to ensure compliance with the SEQR process.

Among other interested parties, I have cc'ed on this communication the Cayuga Nation leaders with whom I have been in contact concerning these matters.

Yours truly,

Dr. V. M. Fichera (PhD)

Adjunct Professor
Binghamton University-SUNY

On Wed, Jul 22, 2015 at 4:59 PM, Clancy, John M (DEC)< john.clancy@dec.ny.gov>wrote:
Hello Mr. Perazio. Thank you for your inquiry.

Our review on the above referenced mining permit application continues.

If a DEC mined land reclamation permit is issued, a permit condition would be included, specifically stating that an archeological investigation must be conducted in respect to cultural

resources and reviewed/approved by NYS OPRHP prior to expansion of the mine into areas that have not yet been investigated.

Appropriate mitigation measures to protect cultural resources would be required, if and as needed, based on OPRHP's recommendations.

Thank you for the opportunity to clarify.

Respectfully yours,

John

From: Perazio, Philip (PARKS)
Sent: Wednesday, July 22, 2015 1:26 PM
To: Clancy, John M (DEC)
Cc: Vandrei, Charles (DEC); cjf9679@yahoo.com; V. Fichera
Subject: Martville Mine, Town of Sterling, Cayuga County (14PR3874 and 15PR02499)

Mr. Clancy,

I am contacting you regarding the above-reference project. We have reviewed archaeological reports for two segments of this property. However, it is our understanding that the life of mine permit under review by DEC encompasses a larger area than what we have reviewed. We would like to inquire whether DEC will require that the remainder of the permit area be subjected to archaeological investigation before the permit is issued or if a stipulation will be included that an investigation be conducted prior to expansion of the mine into areas that have not yet been investigated.

Thank you for your attention to this matter.

Philip A. Perazio
Historic Preservation Program Analyst – Archaeologist

Division for Historic Preservation

New York State Parks, Recreation & Historic Preservation

Peebles Island State Park, P.O. Box 189, Waterford, NY 12188-0189

[518-268-2175](tel:518-268-2175)

Philip.Perazio@parks.ny.gov

www.nyparks.com/shpo

2 Attachments